RECORD AND BRIEFS

No. 16-111

In the Supreme Court of the United States

MASTERPIECE CAKESHOP, LTD., *et al.*,
Petitioners,

v.

COLORADO CIVIL RIGHTS COMMISSION, *et al.*,
Respondents.

On Writ of Certiorari to the Court of Appeals of Colorado

BRIEF OF NORTH CAROLINA VALUES COALITION AND THE FAMILY RESEARCH COUNCIL AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI[1]

North Carolina Values Coalition, and The Family Research Council, as *amici curiae*, respectfully urge this Court to reverse the decision of the Colorado Court of Appeals.

North Carolina Values Coalition is a nonprofit educational and lobbying organization based in Raleigh, NC that exists to advance a culture where human life is valued, religious liberty thrives, and marriage and families flourish. *See* www.ncvalues.org. The Family Research Council is a non-profit organization located in Washington, D.C. that exists to advance faith, family and freedom in public policy and the culture from a Christian worldview. *See* www.frc.org. Both amici have an interest in ensuring that American citizens are free to live and work according to conscience and religious faith.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The First Amendment has never been confined within the walls of a church, as if it were a wild animal needing to be caged. On the contrary, the Constitution broadly guarantees liberty of religion and conscience to citizens who participate in public life according to their moral, ethical, and religious convictions.

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[1] The parties have consented to the filing of this brief. *Amici curiae* certify that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amici*, their members, or their counsel, has made a monetary contribution to its preparation or submission.

The State of Colorado uses its anti-discrimination laws to impose crippling penalties on entrepreneurs who refuse to set aside conscience and create visual artwork that violates the owners' faith and conscience. This application is a frontal assault on liberties Americans have treasured for over 200 years—liberties no person should be required to sacrifice as a condition for owning a business.

Some argue the law is necessary for LGBT persons to achieve equality and access to public goods and services. That rabbit trail diverts attention from the issues at the heart of this case: liberty of conscience, integrity, free speech, and religion. Instead of prohibiting invidious discrimination, the Colorado Court of Appeals creates it. Its ruling jettisons key values heralded by LGBT advocates—*tolerance, diversity, inclusion, equality*. Properly understood and applied, those values facilitate life in a free society and protect the rights of all Americans. But by crushing dissent, Colorado promotes *intolerance, uniformity, exclusion,* and *inequality*. The State cements intolerance into state law and demands uniformity of speech, thought, belief, and action. The result is an unconscionable inequality where people who hold traditional marriage beliefs are excluded from owning a public business. All of this is anathema to the First Amendment.

ARGUMENT

I. THE COLORADO RULING CEMENTS *INTOLERANCE* INTO STATE LAW BY CRUSHING DISSENT.

Colorado refuses to tolerate citizens who disagree with the state-sanctioned view of marriage. But the "personal choices central to individual dignity and autonomy" this Court recognized in *Obergefell*, "including intimate choices defining personal identity and beliefs," apply equally to the State's treatment of Petitioner. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2589, 2597 (2015). Instead, the State "vilif[ies] [an] American[] who [is] unwilling to assent to the new orthodoxy." *Id.* at 2642 (Alito, J., dissenting). Colorado discards this Court's concern about stigma and "put[s] the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied." *Id.* at 2602.

Secular ideologies increasingly employ the strong arm of the state to advance their causes, promoting tolerance and respect for some while ruthlessly suppressing others. Liberty collapses in this toxic atmosphere. Michael W. McConnell, *"God is Dead and We have Killed Him!" Freedom of Religion in the Post-Modern Age*, 1993 BYU L. Rev. 163, 186-188 (1993). The First Amendment protects against government coercion to endorse or subsidize a cause. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). The government is constitutionally powerless to force a *speaker* to support or oppose a particular viewpoint. *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp.*

of Boston, 515 U.S. 557, 575 (1995). But that is exactly what Colorado has done.

As the Sixth Circuit observed, "tolerance is a two-way street." *Ward v. Polite*, 667 F.3d 727, 735 (6th Cir. 2012). So is dignity. Even though this Court has redefined marriage, same-sex couples have no corollary right to coerce an unwilling business owner to celebrate with them. But Colorado would compel Petitioner to "design and create a cake to celebrate [a] same-sex wedding." *Mullins v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 276 (Colo. Ct. App. 2015). This demeans Petitioner. Colorado's intolerance is intolerable in a country devoted to liberty. The American right to pursue happiness is not a license to destroy another person's liberty and livelihood.

II. THE COLORADO RULING COMPELS *UNIFORMITY* OF SPEECH, BELIEF, AND THOUGHT CONCERNING THE NATURE OF MARRIAGE.

"Diversity" is an ongoing mantra for LGBT advocacy. America has always valued diversity. Colorado destroys it by demanding uniformity of thought, belief, speech, and action concerning the nature of marriage. And by silencing one side of a hotly contested issue, the state engages in forbidden viewpoint discrimination. Colorado imposes a burden even more onerous than the compelled speech in *Wooley v. Maynard*, 430 U.S. 705. In *Wooley*, the *state* designed and created the license plate its citizens had to display. Here, Petitioner must design and create an expressive piece of edible art. He is compelled to actively participate in an event he finds morally

objectionable and to communicate a celebratory message he believes is false.

A. Colorado Compels Uniformity of Speech.

Colorado compels Petitioner to create a message that is disagreeable to him—thus coercing uniformity in speech about the nature of marriage. This case is "a glaring example of an encroachment on the freedom of speech." Haley Holik, *Note: You Have the Right to Speak by Remaining Silent: Why a State Sanction to Create a Wedding Cake is Compelled Speech*, 28 Regent U.L. Rev. 299, 301 (2015-2016).

In an ongoing similar case, the Washington Supreme Court criticized a florist's argument for a narrow exception applicable to "businesses, such as newspapers, publicists, speechwriters, photographers, and other artists, that create expression as opposed to gift items, raw products, or prearranged [items]." *State v. Arlene's Flowers*, 389 P.3d 543, 559 (Wash. 2017). The court begrudgingly acknowledged in a footnote that "a handful of cases protecting various forms of art"[2] appeared to "provide surface support" for her position. *Id.* at 559 n. 13. But the court refused to look beneath that surface and summarily dismissed the argument that custom designs are anything but unprotected conduct. Colorado replicates this error, blithely asserting "the First Amendment only protects

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[2] *Ward v. Rock Against Racism*, 491 U.S. 781, 790-91 (1989) (music without words); *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557-58 (1975) (theater); *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1060 (9th Cir. 2010) (tattooing); *Piarowski v. Ill. Cmty. Coll. Dist. 515*, 759 F.2d 625, 627-28 (7th Cir. 1985) (stained glass windows on display in an art gallery at a junior college).

conduct that conveys a message" (*Mullins*, 370 P.3d at 285-286) while ignoring constitutional protection for the process of creating protected speech. There is a subtle but critical distinction between conduct that *is itself* expressive and the action required to *create* expression. Both implicate the First Amendment, but the analysis differs.

Precedent in multiple jurisdictions confirms that custom visual artwork is protected expression.[3] "It goes without saying that artistic expression lies within . . . First Amendment protection." *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 602 (1998) (Souter, J., dissenting). So is the personal labor required to create it. First Amendment protection extends to "creating, distributing, or consuming" speech. *Brown v. Entertainment Merchants Ass'n.*, 131 S. Ct. 2729, 2734 n.1 (2011) (video game restrictions). As the Ninth Circuit explained:

> Although writing and painting can be reduced to their constituent acts, and thus described as conduct, we have not attempted to disconnect

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[3] *See, e.g., Kaplan v. California*, 413 U.S. 115, 119-120 (1973) (pictures, films, paintings, drawings, engravings); *Anderson v. City of Hermosa Beach*, 621 F.3d at 1060-61 (tattoos); *White v. City of Sparks*, 500 F.3d 953, 955-56 (9th Cir. 2007) (artist's original painting); *Comedy III Productions v. Gary Saderup, Inc.*, 21 P.3d 797, 804 (Cal. 2001) (silk-screened t-shirts); *Bery v. City of New York*, 97 F.3d 689, 696 (2d Cir. 1996) (painting, photography, prints, sculpture); *Mastrovincenzo v. City of New York*, 435 F.3d 78, 82, 97 (2d Cir. 2006) (graffiti-painted clothing); *ETW Corp. v. Jireh Publ'g*, 332 F.3d 915, 924 (6th Cir. 2003) (artist's prints of golfer Tiger Woods); *Univ. of Ala. Bd. of Trs. v. New Life Art*, 683 F.3d 1266, 1276 (11th Cir. 2012) (painting of football scenes with university team uniforms).

> the end product from the act of creation. . . . [W]e have never seriously questioned that the processes of writing words down on paper, painting a picture, and playing an instrument are purely expressive activities entitled to full First Amendment protection.

Anderson v. City of Hermosa Beach, 621 F.3d at 1061-62. As an appellate court in Texas expressed it:

> Using a camera to create a photograph or video is like applying pen to paper to create a writing or applying brush to canvas to create a painting. *In all of these situations, the process of creating the end product cannot reasonably be separated from the end product for First Amendment purposes.*

Ex parte Thompson, 442 S.W.3d 325, 337 (Tex. Crim. App. 2014) (emphasis added). The same is true for Petitioner's creation of custom wedding cakes. His creative labors and the end product are inseparable.

Colorado's ruling also does a grave disservice to customers who seek custom creative services. If the artist is repelled by the message he must create, the end product is unlikely to be satisfactory. Coercion produces a counterfeit. That is one reason courts are loathe to order specific performance as a remedy for breach of a contract for personal services—especially where artistic expression is required.[4] The New York

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[4] *See, e.g., Hamblin v. Dinneford*, 2 Edw. Ch. 529, 533-534 (N.Y. 1835) (actor); *Lumley v. Wager*, Ch. App., 42 Eng. Rep. 687 (1852) (singer); *Duff v. Russell*, 14 N.Y.S. 134 (Super. Ct. 1891) (actress/singer); *Okeh Phonograph v. Armstrong*, 63 F.2d 636 (9th

Court of Chancery, declining to compel a singer's performance for an Italian opera, explained that:

> I am not aware that any officer of this court has that perfect knowledge of the Italian language, or possesses that exquisite sensibility in the auricular nerve which is necessary to understand, and to enjoy with a proper zest, the peculiar beauties of the Italian opera, so fascinating to the fashionable world. There might be some difficulty, therefore, even if the defendant was compelled to sing under the direction and in the presence of a master in chancery, in ascertaining whether he performed his engagement according to its spirit and intent. It would also be very difficult for the master to determine *what effect coercion might produce upon the defendant's singing*, especially in the livelier airs; although the fear of imprisonment would unquestionably deepen his seriousness in the graver parts of the drama.

De Rivafinoli v. Corsetti, 4 Paige Ch. 264, 270 (1833) (emphasis added).

B. Colorado Compels Uniformity Of Belief.

Colorado attempts to compel uniformity in its citizens' beliefs about the nature of marriage—at least as those beliefs are expressed in public. The State

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Cir. 1933) (jazz player); *Beverly Glen Music v. Warner Communications*, 178 Cal. App. 3d 1142, 1145 (1986) (singer) ("Denying someone his livelihood is a harsh remedy."). *See also* 5A Corbin, Contracts (1964) § 1204.

squelches beliefs about sexuality that it deems offensive. This is classic viewpoint discrimination.

No one escapes offense in a free society. This Court has flatly rejected the argument that "[t]he Government has an interest in preventing speech expressing ideas that offend." *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017); *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (even hurtful or outrageous speech is protected). But preventing the expression of "ideas that offend" is exactly the interest Colorado offers as a warrant for its blatant viewpoint discrimination. If Colorado's ruling stands, it virtually ensures the state's ability to freely engage in constitutionally forbidden viewpoint discrimination.

Colorado compares its ruling in this case to the Colorado Civil Rights Division's recent ruling that a bakery in Denver did not discriminate when it refused a Christian customer's request to create two bible-shaped cakes inscribed with messages about the sinfulness of homosexuality. *Jack v. Azucar Bakery*, Charge No. P20140069X, at 2 (Colo. Civil Rights Div. Mar. 25, 2015), *available at* http://perma.cc/5K6D-VV8U. The court reasoned that that "the bakeries did not refuse the patron's request because of his creed, but rather because of the offensive nature of the requested message." *Mullins*, 370 P.3d at 282 n. 8. "[T]hat idea strikes at the heart of the First Amendment." *Matal v. Tam*, 137 S. Ct. at 1764. In both *Azucar Bakery* and *Masterpiece Cakeshop*, the government discriminates against a religious viewpoint it judges to be offensive—in one case, the customer, and in the other, the business owner. While the bakery in *Azucar* has the right not to create artwork the owner finds

offensive, it is the *owner's* rights that warrant that conclusion—not the *government's* judgment that the customer's message is offensive. In *Matal*, this Court rejected the government's alleged interest in "preventing underrepresented groups from being 'bombarded with demeaning messages in commercial advertising.'" *Matal v. Tam*, 137 S. Ct. at 1764 (internal citations and quotation marks omitted). Even in the world of commerce, the state has no "blanket exemption from the First Amendment's requirement of viewpoint neutrality." *Id.* at 1767.

Colorado may not like or agree with Petitioner's viewpoint, but the Constitution demands that courts protect his freedom to "decide for himself . . . the ideas and beliefs deserving of expression, consideration, and adherence. . . . Government action that . . . requires the utterance of a particular message favored by the Government, contravenes this essential right." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 646 (1994).

C. Colorado Compels Uniformity Of Thought.

Freedom of thought undergirds the First Amendment:

> If any provisions of the Constitution can be singled out as requiring unqualified attachment, they are the guaranties of the Bill of Rights and especially that of freedom of thought contained in the First Amendment.

Schneiderman v. United States, 320 U.S. 118, 144 (1943). The Constitution protects "both the right to speak freely *and the right to refrain from speaking at all*"—the right to advance ideological causes and "*the*

concomitant right to decline to foster such concepts." *Wooley v. Maynard*, 430 U.S. at 714 (emphasis added). The distinction between compelled speech and compelled silence is "without constitutional significance" in the context of protected speech. *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988). These complementary rights are components of "individual freedom of mind." *Barnette*, 319 U.S. at 637. Colorado contravenes "[t]he very purpose of the First Amendment . . . to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion." *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring).

This Court should reaffirm these core constitutional principles. The *Obergefell* majority reassured dissenters that their First Amendment rights would remain intact. *Obergefell*, 135 S. Ct. at 2607. Yet that opinion has triggered multiple threats to the liberty of Americans to think, speak, and live according to conscience.[5] Even some LGBT advocates admit that:

> A court's insistence that the legal recognition of same-sex couples be designated "marriage"

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[5] Both before and after *Obergefell* there have been wedding vendor cases, often resulting in devastating legal and financial penalties. *See, e.g., Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013) (photographer fined for declining to take pictures of same-sex commitment ceremony); *Odgaard v. Iowa Civil Rights Comm'n*, No. CVCV046451 (Iowa Dist. Ct. Apr. 3, 2014) (wedding event operators); *In the Matter of Alex Klein and Melissa Klein*, 34 BOLI Orders 80 (2015) ($135,000 damages agninst owners of Sweetcakes Bakery); *Amy Lynn Photography Studio, LLC v. City of Madison*, No. 17 CV 555 (Wis. Cir. Ct. filed Mar. 7, 2017).

> imposes an intellectual and social view that may not be held by a majority of citizens within its jurisdiction, and does so through the creation of not simply "a brand-new 'constitutional right'" but a disquieting new breed—a "right" to a *word*, *an unprecedented notion having inauspicious potential for regulating speech and thought*.

Daniel Dunson, *A Right to a Word? The Interplay of Equal Protection and Freedom of Thought in the Move to Gender-Blind Marriage*, 5 Alb. Govt. L. Rev. 552, 599-600 (2012) (emphasis added). The ominous First Amendment implications "impact countervailing liberty interests, which have been virtually ignored by proponents of court-ordered gender-blind marriage." *Id.* at 555. Those "countervailing liberty interests" are at stake here. Colorado uses its anti-discrimination law to punish dissenting views and force uniformity of thought about the nature of marriage.

D. Colorado Compels Violation Of Conscience.

Freedom of thought is closely linked to conscience. Individuals hold the right to adopt a point of view "and to refuse to foster . . . an idea they find morally objectionable." *Wooley v. Maynard*, 430 U.S. at 715. Respect for individual conscience is deeply rooted in American history. The nation's legal system has traditionally respected conscience, as illustrated by statutory and judicially crafted principles in other contexts. One case, acknowledging man's "duty to a moral power higher than the State," quotes Harlan Fiske Stone (later Chief Justice):

> "...both morals and sound policy require that the state should not violate the conscience of the individual. All our history gives confirmation to the view that liberty of conscience has a moral and social value which makes it worthy of preservation at the hands of the state. So deep in its significance and vital, indeed, is it to the integrity of man's moral and spiritual nature that nothing short of the self-preservation of the state should warrant its violation; and it may well be questioned whether the state which preserves its life by a settled policy of violation of the conscience of the individual will not in fact ultimately lose it by the process." Stone, *The Conscientious Objector*, 21 Col. Univ. Q. 253, 269 (1919).

United States v. Seeger, 380 U.S. 163, 170 (1965). It is hazardous for any government to systematically crush the conscience of its citizens. But that is exactly what this ruling does, breeding a nation of business owners who lack *conscience*—citizens who must set aside conscience, values, and religion simply to remain in business.

Courts have long respected conscience rights in other contexts. After abortion became legal, Congress acted swiftly to preserve the conscience rights of professionals who object to participating in abortions. When Senator Church introduced the "Church Amendment" (42 U.S.C. § 300a-7(c)) for that purpose, he explained that: "Nothing is more fundamental to our national birthright than freedom of religion." 119 Cong. Rec. 9595 (1973). The conscience and integrity of a private business owner is entitled to respect. Instead,

Colorado compels people of faith to personally participate in events they consider immoral.

Many state constitutions link free exercise to "liberty of conscience."[6] Colorado is one of them:

> The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever hereafter be guaranteed; and no person shall be denied any civil or political right, privilege or capacity, on account of his opinions concerning religion; but *the liberty of conscience hereby secured* shall not be construed to dispense with oaths or affirmations, excuse acts of licentiousness or justify practices inconsistent with the good order, peace or safety of the state. No person shall be required to attend or support any ministry or place of worship, religious sect or denomination against his consent. Nor shall any preference be given by law to any religious denomination or mode of worship.

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[6] *See* A.R.S. Const. Art. II, § 12; Ark. Const. Art. 2, § 24; Cal. Const. art. I, § 4; Colo. Const. Art. II, Section 4; Del. Const. art I, § 1; Ga. Const. Art. I, § I, Para. III; Idaho Const. Art. I, § 4; Illinois Const., Art. I, § 3; Ind. Const. Art. 1, §§ 2, 3; Kan. Const. B. of R. § 7; Ky. Const. § 1; ALM Constitution Appx. Pt. 1, Art. II; Me. Const. Art. I, § 3; MCLS Const. Art. I, § 4; Minn. Const. art. 1, § 16; Mo. Const. Art. I, § 5; Ne. Const. Art. I, § 4; Nev. Const. Art. 1, § 4; N.H. Const. Pt. FIRST, Art. 4 and Art. 5; N.J. Const., Art. I, Para. 3; N.M. Const. Art. II, § 11; NY CLS Const Art I, § 3; N.C. Const. art. I, § 13; N.D. Const. Art. I, § 3; Oh. Const. art. I, § 7; Orc. Const. Art. I, §§ 2, 3; Pa. Const. Art. I, § 3; R.I. Const. Art. I, § 3; S.D. Const. Article VI, § 3; Tenn. Const. Art. I, § 3; Tex. Const. Art. I, § 6; Utah Const. Art. I, § 4; Vt. Const. Ch. I, Art. 3; Va. Const. Art. I, § 16; Wash. Const. art. 1, § 11; Wis. Const. Art. I, § 18; Wyo. Const. Art. 1, § 18.

Colo. Const. Art. II, Section 4 (emphasis added). Yet the word "conscience" appears nowhere in the appellate court's decision, and there is no discussion of the concept. Other state courts have shown more respect for individual conscience. One Minnesota court ruled in favor of a religious deli owner who refused to deliver food to an abortion clinic, explaining that: "Deeply rooted in the constitutional law of Minnesota is the fundamental right of every citizen to enjoy 'freedom of conscience.'" *Rasmussen v. Glass*, 498 N.W.2d 508, 515 (Minn. Ct. App. 1993).

Liberty of conscience underlies the Establishment Clause and the unique taxpayer standing rules developed in *Flast v. Cohen*, 392 U.S. 83 (1968):

> [T]he Framers' generation worried that conscience would be violated if citizens were required to pay taxes to support religious institutions with whose beliefs they disagreed.

Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1446-1447 (2011), quoting Feldman, *Intellectual Origins of the Establishment Clause*, 77 N. Y. U. L. Rev. 346, 351 (2002). An equivalent principle is true here: Colorado requires a business owner to violate his conscience by celebrating an event he believes to be immoral. This is as much a frontal assault on conscience as the Establishment Clause evil of compelling citizens to support religious beliefs they do not hold.

No American should ever have to choose between allegiance to the state and faithfulness to God in order to remain in business. Conscientious objector claims are "very close to the core of religious liberty." Nora

O'Callaghan, *Lessons From Pharaoh and the Hebrew Midwives: Conscientious Objection to State Mandates as a Free Exercise Right*, 39 Creighton L. Rev. 561, 565, 611, 615-616 (2006). Prior to *Emp't Div., Ore. Dep't of Human Res. v. Smith*, 494 U.S. 872 (1990), many winning cases involved conscientious objectors—believers seeking freedom from state compulsion to commit an act against conscience. *Girouard v. United States*, 328 U.S. 61 (1946) (military combat); *Sherbert v. Verner*, 374 U.S. 398 (1963) (Sabbath work); *Barnette*, 319 U.S. 624 (flag salute); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (high school education). Many losing cases involve "civil disobedience" claimants seeking to engage in illegal conduct, e.g., *Prince v. Massachusetts*, 321 U.S. 158 (1944) (child labor). *Lessons From Pharaoh*, 39 Creighton L. Rev. at 564 (2006). *Smith* repeatedly emphasized the *criminal* conduct at issue. *Smith*, 494 U.S. at 874, 878, 887, 891-892, 897-899, 901-906, 909, 911-912, 916, 921. Unlike the *Smith* plaintiffs, Petitioner does not seek to commit a criminal act, but to peacefully decline business that would require him to violate his conscience. Courts should allow the free market to work. As a quick internet search reveals, there are many businesses that expressly cater to same-sex ceremonies. *See, e.g.*, www.lgbtweddings.com; www.engaygedweddings.com.

America was founded by people who risked their lives to escape religious tyranny and observe their faith free from government intrusion. This Court's decision has broad ramifications all citizens burdened by legal directives to act against conscience. In light of the high value that courts, legislatures, and state constitutions have historically assigned to conscience and religious liberty, it is incumbent upon this Court to protect the

right to live and work according to conscience, and decline to participate in morally objectionable events. Congress has ranked religious freedom "among the most treasured birthrights of every American." Sen. Rep. No. 103-111, 1st Sess., p. 4 (1993), reprinted in 1993 U.S. Code Cong. & Admin. News, at pp. 1893-1894. This Court expressed it eloquently in ruling that an alien could not be denied citizenship because of his religious objections to bearing arms:

> The struggle for religious liberty has through the centuries been an effort to accommodate the demands of the State to the conscience of the individual. The victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State. Throughout the ages, men have suffered death rather than subordinate their allegiance to God to the authority of the State. Freedom of religion guaranteed by the First Amendment is the product of that struggle.

Girouard v. United States, 328 U.S. at 68. We dare not sacrifice priceless American freedoms through misguided—or even well-intentioned—government efforts to broaden LGBT rights. People of faith have not forfeited their right to conduct business according to conscience and convictions.

III. THE COLORADO RULING PUNISHES PERSONS WHO HOLD DISSENTING VIEWS BY FORCING THEIR *EXCLUSION* FROM BUSINESSES THAT SERVE THE PUBLIC.

The Constitution is an inclusive document protecting the life, liberty, religion, and viewpoint of all within its realm. LGBT advocates trumpet inclusion as a key rationale for anti-discrimination provisions. Instead, the Colorado ruling creates an intolerable danger of *exclusion* for free speech and artistic expression. If it stands, states can easily punish persons who hold traditional marriage beliefs by *excluding* them from full participation in public life. Colorado compels Petitioner to choose between his convictions and his livelihood, all because he refuses to sacrifice his conscience and faith on the altar of an agenda he cannot support.

A. Colorado Discriminates Against Business Owners Who Hold Conscientious Objections To Participating In Same-Sex Ceremonies.

There *is* discrimination in this case—not against LGBT consumers, but Colorado's blatant discrimination against Petitioner and others who share his views about marriage. Colorado imposes onerous penalties that threaten Petitioner's livelihood. But "[n]o person can be punished for entertaining or professing religious beliefs or disbeliefs . . . ." *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1, 15-16 (1947). The government may not "*exclude[] a person from a profession or punish[] him* solely because he is a member of a particular political organization or *because*

he holds certain beliefs." *Baird v. State Bar of Arizona*, 401 U.S. 1, 6 (1971) (emphasis added); *see also Keyishian v. Bd. of Regents*, 385 U.S. 589, 607 (1967) (professor). This Court has a "duty to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people." *Lee v. Weisman*, 505 U.S. 577, 592 (1992). The Framers intentionally protected "the integrity of individual conscience in religious matters." *McCreary County, KY v. ACLU*, 545 U.S. 844, 876 (2005).

Following one's "chosen profession free from unreasonable governmental interference" is a benefit that "comes within the 'liberty' and 'property' concepts" of the Due Process Clause. *Greene v. McElroy*, 360 U.S. 474, 492 (1959). The Colorado ruling grates against the Constitution. It is tantamount to a statement that "no religious believers who refuse to [celebrate same-sex relationships] may be included in this part of our social life." *Lessons From Pharaoh*, 39 Creighton L. Rev. at 573. Crippling penalties will force Petitioner—and others who hold similar viewpoints about marriage—to shut down and cease business. This is contrary to a multitude of this Court's precedents.

B. The Commercial Context Is Constitutionally Irrelevant.

Believers do not forfeit their constitutional rights when they enter the commercial sphere. Just last term, this Court emphatically reaffirmed the viability of free speech in the commercial realm, striking down the "disparagement" provision of the Lanham Act because it "offends [the] bedrock First Amendment principle" that "[s]peech may not be banned on the ground that it expresses ideas that offend." *Matal v. Tam*, 137 S. Ct.

at 1751. Petitioner's right to speak—or remain silent—remains viable in the commercial sphere.

If religion and conscience are shoved to the private fringes of life, constitutional guarantees ring hollow. *"God is Dead and We have Killed Him!"*, 1993 BYU L. Rev. at 176. Petitioner wishes to conduct his business with integrity, setting company policies consistent with his conscience, moral values, and faith. Not everyone shares those values, but cutting conscience out of the commercial sphere is a frightening prospect for business owners, employees, and customers. Customers expect businesses to operate with honesty and integrity.

Petitioner's refusal to create visual artwork is not the invidious, irrational, arbitrary discrimination the Constitution prohibits. It is hardly "discrimination" to decline to advance a politically charged agenda, particularly since no one has an unqualified right to demand that a *particular* cake artist craft a custom design for a *particular* event. Some courts have cited *United States v. Lee*, 455 U.S. 252 (1982) to justify their intrusion on free expression rights, arguing that citizens who enter the commercial world accept certain limitations on their conduct. *See, e.g., Arlene's Flowers*, 389 P.3d at 555. But *Lee* does not hold that believers forfeit all constitutional rights in the business world, especially when such forfeiture would exclude them from even operating a business. Note the context of the often cited language:

> Congress and the courts have been sensitive to the needs flowing from the Free Exercise Clause, but *every* person cannot be shielded from *all* the burdens incident to exercising *every* aspect of the

> right to practice religious beliefs. When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.

United States v. Lee, 455 U.S. at 261 (emphasis added). The limits on constitutional rights in the commercial realm are narrow—not all-encompassing. The Free Exercise Clause may not trump every statutory scheme applicable to commerce, but neither do commercial regulations erase religious liberty.

Religious freedom is not abrogated in the world of commerce. Indeed, conflicts between religion and regulation typically occur in commercial settings. Some claimants succeeded:

- *Sherbert v. Verner*, 374 U.S. 398 (and other unemployment cases)
- *Rasmussen v. Glass*, 498 N.W.2d 508 (food delivery)
- *Attorney Gen. v. Desilets*, 636 N.E.2d 233 (Mass. 1994) (housing)

Others did not:

- *Braunfeld v. Brown*, 366 U.S. 599 (1961) (Sunday closing)
- *United States v. Lee*, 455 U.S. 252 (Amish business)
- *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) (commercial association)

- *Tony and Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290 (1985) (payroll)
- *State ex rel. McClure v. Sports & Health Club, Inc.*, 370 N.W.2d 844, 853 (Minn. 1985) (hiring)
- *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska 1994) (housing)

The "commercial" factor was only one of several elements in the analysis, not the determinative factor.

As Justice Alito warned:

> I assume that those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools.

Obergefell, 135 S. Ct. at 2642-43 (Alito, J., dissenting). Colorado has unquestionably labeled and treated Petitioner as a bigot. This Court now has an opportunity to clarify and strengthen the Constitution's application to public life.

IV. THE COLORADO RULING CREATES INVIDIOUS *INEQUALITY* BY PUNISHING A DISSENTING VIEW OF MARRIAGE.

Equality is a key "buzzword" for LGBT advocacy. Some use the phrase "marriage equality" to describe *Obergefell*. Legal advocates have not only achieved their goals, but far exceeded them. LGBT persons enjoy broad legal protection. Same-sex couples have a wide array of options for employment and public services. Petitioner has not declined to serve LGBT persons. On the contrary, he "advis[ed] Craig and Mullins that he

would be happy to make and sell them any other baked goods." *Mullins*, 370 P.3d at 276.

Colorado's decision is ground in state law prohibiting discrimination. But there is an "elephant" in the courtroom. The term "discrimination" needs a clear, consistent definition before a court can accurately characterize Petitioner's conduct:

> [C]ourts must more clearly evaluate when public accommodation laws have actually been violated, as opposed to when the individual or business is simply refusing to endorse a particular message.

James M. Gottry, Note, *Just Shoot Me: Public Accommodation Anti-Discrimination Laws Take Aim at First Amendment Freedom of Speech*, 64 Vand. L. Rev. 961, 999 (2011). Colorado selectively plucks phrases from *Obergefell* to justify its punitive application of state law:

> Further, in *Obergefell v. Hodges* . . . the Supreme Court equated laws precluding same-sex marriage to discrimination on the basis of sexual orientation. *Id.* at __, 135 S. Ct. at 2604 (observing that the "denial to same-sex couples of the right to marry" is a "disability on gays and lesbians" which "serves to disrespect and subordinate them").

Mullins, 370 P.3d at 281. Yet Colorado "disrespect[s] and subordinate[s]" those who hold traditional marriage views, rendering them unequal, second-class citizens.

This case is not really about LGBT rights or discrimination. That smokescreen obscures the invidious *inequality* Colorado has created. Citizens who graciously serve, interact with, and employ LGBT persons, but oppose redefining the institution of marriage, are now treated as *unequal*. Colorado imposes crippling penalties to punish a dissenting view of marriage. This blatant viewpoint discrimination is anathema to the First Amendment.

A. Anti-Discrimination Provisions Have Expanded To Cover More Places And Protect More Groups—Complicating The Legal Analysis And Triggering Collisions With The First Amendment.

Anti-discrimination principles have expanded over the years, increasing the potential encroachment on religious liberty. Commentators have long observed the legal quagmire:

> This conflict between the statutory rights of individuals against private acts of discrimination and the near universally-recognized right of free exercise of religion places a complex legal question involving competing societal values squarely before the courts.

Jack S. Vaitayanonta, Note: *In State Legislatures We Trust? The "Compelling Interest" Presumption and Religious Free Exercise Challenges to State Civil Rights Laws*, 101 Colum. L. Rev. 886, 887 (2001). *See also* Harlan Loeb and David Rosenberg, *Fundamental Rights in Conflict: The Price of a Maturing Democracy*, 77 N.D. L. Rev. 27, 29 (2001); David E. Bernstein,

Defending the First Amendment From Antidiscrimination, 82 N.C. L. Rev. 223 (2003) (urging resolution in favor of First Amendment liberties).

Anti-discrimination policies have ancient roots. The Massachusetts law at issue in *Hurley* was derived from the common law principle that innkeepers and others in public service could not refuse service without good reason. *Hurley*, 515 U.S. at 571. But like many other states today, Massachusetts had broadened the scope to add more categories and places. *Id.* at 571-572.

Early American laws were carefully crafted with narrow definitions of the people and places regulated. These laws focused almost exclusively on eliminating the racial discrimination that had plagued the nation for decades. *Just Shoot Me*, 64 Vand. L. Rev. 961, 965 (2011). Primary responsibility shifted to the states after this Court invalidated the Civil Rights Act of 1875, ch. 114, 18 Stat. 335 (1875). *The Civil Rights Cases*, 109 U.S. 3 (1883). *See Just Shoot Me,* 64 Vand. L. Rev. at 965 n. 7. Later federal attempts succeeded but again highlighted racial equality. The Civil Rights Act of 1964 "was enacted with a spirit of justice and equality in order to remove racial discrimination from certain facilities which are open to the general public." *Miller v. Amusement Enters., Inc.*, 394 F.2d 342, 352 (5th Cir. 1968); *see* Civil Rights Act of 1964, 42 U.S.C. § 2000a.

There has been a vast expansion of covered categories, often with little analysis of the difference between race and newly protected classes—or as to how or when the criteria might be legitimately related to a business decision. A current District of Columbia statute prohibits discrimination based not only on race

or color, but also "religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, familial status, family responsibilities, genetic information, disability, matriculation, political affiliation, source of income, or place of residence or business of any individual." D.C. Code § 2-1402.31(a); *see Just Shoot Me*, 64 Vand. L. Rev. 961 at 966; *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656 n. 2 (2000).

Early anti-discrimination laws also narrowly defined "places of public accommodation" in terms of transient lodging, theaters, restaurants, and places of public entertainment. *Just Shoot Me*, 64 Vand. L. Rev. 961 at 966. But eventually these traditional "places" expanded beyond inns and trains to commercial entities and even membership associations—escalating the potential collision with First Amendment rights. *Dale*, 530 U.S. at 657. Even today, federal law is reasonably similar to common law rather than broadly sweeping in *any* establishment that offers *any* goods or services to the public. 42 U.S.C. § 2000a(b). But Colorado's expansive definition for "place of public accommodation" captures "any place of business engaged in any sales to the public and any place offering services, facilities, privileges, advantages, or accommodations to the public, including but not limited to any business offering wholesale or retail sales to the public." Colo. Rev. Stat. § 24-34-601(1).

It is hardly "arbitrary" to avoid promoting a cause for reasons of conscience. Discrimination is arbitrary where an entire class of persons is excluded without justification—based on irrelevant factors. Where widespread refusals deny an entire group access to

basic public goods and services—such as lodging, food, and transportation—it is reasonable to enact protective measures. This Court rightly upheld the civil rights legislation Congress passed to eradicate America's long history of racial discrimination. *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964). But as protection expands to more places and people, so does the potential to employ anti-discrimination principles to suppress traditional viewpoints and impose social change on unwilling participants. Religious liberty is particularly susceptible to infringement:

> With respect to the great post-modern concerns of sexuality, race, and gender, the advocates of social change are anything but indifferent toward the teachings of traditional religion—and since they are not indifferent they are not tolerant.

McConnell, *"God is Dead and We have Killed Him!"*, 1993 BYU L. Rev. at 187.

Political and judicial power can be used to squeeze religious views out of public debate about controversial social issues—such as marriage. Religious voices have shaped views of sexual morality for centuries. These views about right and wrong are deeply personal convictions that shape the way people of faith live their daily lives, privately and in public. Government has no right to legislate a particular view of sexual morality and then demand that all citizens facilitate it.

The clash between anti-discrimination rights and religious liberty "places a complex legal question involving competing societal values squarely before the courts." *In State Legislatures We Trust?*, 101 Colum. L.

Rev. at 887. When the D.C. Circuit addressed the question "of imposing official orthodoxy on controversial issues of religious, moral, ethical and philosophical importance, upon an entity whose role is to inquire into such matters" it concluded that "[t]he First Amendment not only ensures that questions on difficult social topics will be asked, it also *forbids government from dictating the answers*." *Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1, 24 (D.C. 1987) (emphasis added). Anti-discrimination rights, whether created by statute or derived from equal protection principles, may conflict with core rights to religious liberty. *Fundamental Rights in Conflict*, 77 N.D. L. Rev. at 27, 29.

The growing conflict between religion and anti-discrimination principles emerges in many contexts. Protection of one group may alienate another. Solutions are difficult to craft, particularly in the wake of expanding privacy rights. But while private sexual conduct is generally protected from government intrusion, that protection does not trump the First Amendment rights of those who cannot conscientiously endorse it—*let alone create custom artwork to celebrate it*. Colorado's law extends far beyond the "meal at the inn" promised by common law and encroaches on Petitioner's right to conduct a business free of legal mandates to violate his conscience. "[H]olding [Colorado's] public accommodation statutes in higher regard than the First Amendment inflicts massive damage on free speech rights by forcing [Petitioner] to express and affirm an ideology with which [he] disagree[s]." *You Have the Right to Speak by Remaining Silent*, 28 Regent U.L. Rev. at 315.

B. Where "Discrimination" Is Integrally Related To The Exercise Of A Core Constitutional Right, It Is Not Arbitrary, Irrational, Or Unreasonable.

Action motivated by conscience or faith is not arbitrary, irrational, or unreasonable. In the unemployment cases, this Court warned that "to consider a religiously motivated resignation to be 'without good cause' tends to exhibit hostility, not neutrality, towards religion." *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136, 142 (1987); *Thomas v. Review Bd. of Ind. Emp't*, 450 U.S. 707, 708 (1981). Here, Colorado exhibits hostility toward religion by characterizing Petitioner's religiously motivated conduct as unlawful "discrimination."

Other contexts illustrate the relevance of motivation. A person who deliberately refuses medical treatment, desiring to die, commits suicide. But a person who wants to live, yet refuses treatment on religious grounds, does not. Gerard V. Bradley, *Beguiled: Free Exercise Exemptions And The Siren Song of Liberalism*, 20 Hofstra L. Rev. 245, 263-264 (1991). Killing another person in self-defense is justifiable homicide. The same act, where premeditated with malice aforethought, is first degree murder. The former carries no legal penalties, while the latter warrants severe consequences.

Colorado equates things that are inherently unequal, ignoring the distinction between a refusal to serve all LGBT customers and declining to participate in a single event. But this "equality" creates an unconscionable inequality between LGBT customers—who are granted a universal right to coerce custom

artwork—and the artists whose rights to free speech and religion are buried in the dust with a crumbling Constitution.

V. IRONICALLY, THE COLORADO RULING WEAKENS CONSTITUTIONAL PROTECTION FOR EVERYONE—INCLUDING LGBT PERSONS.

Proponents of LGBT rights have accomplished dramatic social and political transformation in just a few years by exercising their rights to free speech, press, association, and the political process generally. These changes were possible because the Constitution guarantees free expression and facilitates the advocacy of new ideas. *Defending the First Amendment From Antidiscrimination*, 82 N.C. L. Rev. at 232. But advocates are not entitled to demand for themselves what they would deny to others—otherwise, the constitutional foundation will crumble and all Americans will suffer. Overly aggressive assertion of particular rights can erode protection for other liberties. Here, Colorado wields its anti-discrimination law as a sword, empowering statutory LGBT rights to trump the protected liberties of an artist who—while willing to "design and create any other bakery product for them" (*Mullins*, 370 P.3d at 280)—holds a different view about the nature of marriage.

This Court needs to preserve the constitutional liberties guaranteed to *all* citizens. Americans who want to expand their own civil rights must grant equal respect to opponents, not crush them with debilitating legal penalties: "The price of freedom of religion or of speech or of the press is that we must put up with, and even pay for, a good deal of rubbish." *United States v.*

Ballard, 322 U.S. 78, 95 (1944). Colorado may consider Petitioner's view "rubbish," but that does not give the state a right to compel him to create visual artwork to promote a message he finds offensive:

> *If Americans are going to preserve their civil liberties...they will need to develop thicker skin.* One price of living in a free society is toleration of those who intentionally or unintentionally offend others. *The current trend, however, is to give offended parties a legal remedy, as long as the offense can be construed as "discrimination."* ... Preserving liberalism, and the civil liberties that go with it, requires a certain level of virtue by the citizenry. Among those necessary virtues is tolerance of those who intentionally or unintentionally offend, and sometimes, when civil liberties are implicated, who blatantly discriminate. *A society that undercuts civil liberties in pursuit of the "equality" offered by a statutory right to be free from all slights will ultimately end up with neither equality nor civil liberties.*

Defending the First Amendment From Antidiscrimination, 82 N.C. L. Rev. at 245 (emphasis added).

This principle cuts across all viewpoints and all constitutional rights. The First Amendment protects a broad spectrum of expression, popular or not. In fact, the increasing popularity of an idea makes it all the more essential to protect dissenting voices. *Dale*, 530 U.S. at 660. Censorship spells death for a free society. "Once used to stifle the thoughts that we hate...it can stifle the ideas we love." *Gay Alliance of Students v.*

Matthews, 544 F.2d 162, 167-168 (4th Cir. 1976). Justice Black said it well in a case about the Communist Party, which advocated some of the most dangerous ideas of the twentieth century:

> "I do not believe that it can be too often repeated that the freedoms of speech, press, petition and assembly guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish." *Communist Party v. SACB*, 367 U.S. 1, 137 (dissenting opinion) (1961).

Healy v. James, 408 U.S. 169, 187-188 (1972). *Healy* is about association rights rather than speech or religion. But upholding the Colorado ruling will not ultimately advance the cause of any group seeking enhanced constitutional protection. On the contrary, the liberty of all Americans will suffer irreparable harm if the government is granted power to coerce creative services that communicate its preferred message. Non-discrimination principles should never be applied in a discriminatory, unequal manner that squelches the First Amendment rights of others.

CONCLUSION

This Court should reverse the decision of the Colorado Court of Appeals.

Respectfully submitted,

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